

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

THE HOLMES GROUP, INC.,

Plaintiff,

vs.

WEST BEND HOUSEWARES, LLC and
FOCUS PRODUCTS GROUP, LLC,

Defendants.

Civil Action No. 05-CV-11367 WGY
(Alexander, M.J.)

**WEST BEND'S SECOND MOTION FOR
SUMMARY JUDGMENT OF NONINFRINGEMENT**

Plaintiff The Holmes Group, LLC ("Holmes") accuses Defendants West Bend Housewares, LLC and Focus Products Group, LLC (collectively referred to as "West Bend" for purposes of this motion) of infringing Holmes' U.S. Patent Nos. 6,573,483 ("the '483 patent") and 6,740,855 ("the '855 patent"), both entitled "Programmable Slow Cooker Appliance." The '855 patent is a continuation of the '483 patent. After the Court construed the claims of the '483 and '855 patents at the *Markman* hearing, the Court granted West Bend's motion for summary judgment of no literal infringement upon Holmes' stipulation that the entire programmable controller/circuit of claims 13 and 20 (collectively the "programmable circuit") in the accused West Bend product was not mounted to or positioned within an outside housing as required by those claims.

Pursuant to Rules 56(a) and (b) of the Federal Rules of Civil Procedure, West Bend now moves for summary judgment of no infringement on the following bases: (1) West Bend's product does not satisfy the claim limitation that the entire programmable circuit be mounted to or positioned within the claimed housing outside the heating unit under the Doctrine of

Equivalents (“DOE”) because, as a matter of law, Holmes is not entitled to rely upon the DOE with regard to this limitation; and (2) alternatively, West Bend’s product does not satisfy the claim limitation that the programmable circuit housing be positioned largely outside of the heating unit either literally or under the DOE because: (A) as a matter of law, Holmes has disclaimed any claim scope that would cover West Bend’s product, and the undisputed facts establish that West Bend’s programmable circuit housing is not positioned largely outside the heating unit; and (B) as a matter of law, Holmes is not entitled to rely upon the DOE with regard to this limitation.

The grounds supporting this summary judgment motion are more fully set forth in the accompanying: (1) defendants’ statement of material facts as to which there are no genuine issues of dispute; (2) defendants’ memorandum in support of the motion; and (3) other supporting exhibits, including pertinent excerpts from the prosecution histories of the patents-in-suit.

For the foregoing reasons, and those set forth in the accompanying documents submitted in support of this motion, West Bend respectfully requests the Court to (1) enter summary judgment against Holmes and in favor of West Bend on Holmes’ complaint and West Bend’s counterclaims seeking a declaration of noninfringement that West Bend does not infringe claims 13, 14, 17 and 19 of the ‘483 patent or claims 20, 24, 26, 27 and 29 of the ‘855 patent; and (2) dismiss Holmes’ complaint with prejudice.

REQUEST FOR ORAL ARGUMENT

Under Local Rule 7.1(D), Cohesive believes that oral argument will assist the Court and thus requests a hearing.

LOCAL RULE 7.1 CERTIFICATE

The undersigned certify that on November 29, 2006 counsel for the parties conferred by telephone in a good faith attempt to resolve or narrow the issues presented in this motion but were unable to reach agreement.

Dated: December 1, 2006

WEST BEND HOUSEWARES, LLC
FOCUS PRODUCTS GROUP, LLC
By their attorneys,

/s/ Erik P. Belt

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CERTIFICATE OF SERVICE

I certify that, on the above date, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants.

/s/ Erik P. Belt

Erik Paul Belt, BBO # 558620